82-1744

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

SUSAN B. ERZINGER, et al.,
Petitioners,

vs.

REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Respondents.

On Petition for a Writ of Certiorari to the California Court of Appeal, Fourth Appellate District, Division One

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I

Whether the assessment by a state university of an educationally-related and neutrally-imposed registration fee violates the free exercise of religion or associational rights of students who object on religious or philosophical grounds to the use of such fees to fund a comprehensive health service, including pregnancy counseling and abortion.

II

Whether the payment of a mandatory registration fee, a portion of which supports a comprehensive health service program at a state university, constitutes compelled participation in the performance of abortions in violation of 42 U.S.C. section 300a-7.

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The Petition for Certiorari in this case follows affirmance by the California Court of Appeal of a decision by the Superior Court of San Diego County that the use of mandatory student fees by the University of California to provide abortion services and pregnancy-related counseling does not infringe Petitioners' rights under the First Amendment. (C.T. 995.)[1]

[1]"C.T." designates the Clerk's transcript. References to the "Transcript of Hearing" in the trial court and to the "Opinion" of the California Court of Appeal are to Petitioners' Appendix (P.A. ....). *(Continued on next page.)*

A comprehensive range of student health services is one of many services funded by mandatory fees assessed on all students at the nine campuses of the University of California.[2] Health plans vary from campus to campus, but all share a common objective: to provide readily accessible health care to students, thereby allowing them to take optimum advantage of their educational opportunities. (C.T. 674-675.)

Pregnancy necessarily affects a woman's physical well-being and may well affect her academic performance. Some women may choose to take their pregnancy to term; others may elect to exercise their right to an abortion. The University provides a health care program that is equally applicable to both alternatives and offers counseling to allow students to make an intelligent choice. The entire health

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The trial court's ruling came on the University's motion for partial summary judgment and was dispositive of claims raised by plaintiffs, except for their third cause of action which asserted that mandatory University fees were being used for "political and ideological activities" in violation of their associational rights under this Court's ruling in *Abood v. Detroit Board of Education*, 431 U.S. 209, 52 L.Ed.2d 261, 97 S.Ct. 1782 (1977). That third cause of action was subsequently dismissed by agreement of the parties. (C.T. 957-964.) The Petition for Certiorari mistakenly combines claims properly raised here concerning the University's provision of abortion services with claims unrelated to abortion which allege "political and ideological" activities by fee-supported student organizations. In fact, only allegations concerning University fee support to abortion-related aspects of health service are at issue here. The final judgment below records the voluntary dismissal of issues not adjudicated in the court's April 24, 1980, decision. (C.T. 957-958.)

[2]Others include student financial aid services, educational and vocational counseling, special education programs, communication services, student government, recreation and athletics, and student affirmative action. (C.T. 672-673.)

care program, including these pregnancy-related services, is provided equally to all students and is based on a legitimate educationally-related objective of attempting to minimize the detrimental effects of health care conditions upon a student's academic performance. (C.T. 674-675.)

REASONS FOR DENYING THE WRIT

The decision of the California Court of Appeal is in full accord with federal statutory and case law, including that cited by petitioners in support of their request for certiorari. There is no unsettled question of law nor any conflict in the law which requires the grant of a writ of certiorari in this case.

I

THE STATE COURT OF APPEAL CORRECTLY HELD THAT THE PAYMENT OF A STUDENT FEE IN SUPPORT OF A COMPREHENSIVE HEALTH SERVICE PROGRAM DOES NOT CONSTITUTE AN UNDUE BURDEN UPON THE FREE EXERCISE OF RELIGION

A. The Payment of the Fee Does Not Force Petitioners to Identify with Beliefs Repugnant to Their Religion

A crucial element in establishing a free exercise violation is the presence of coercion. (*School District of Abington Township v. Schempp*, 374 U.S. 203, 10 L.Ed.2d 844, 83 S.Ct. 1560 (1963).) Both the trial court and the Court of Appeal properly determined, as a matter of law, that no coercion exists in the present case. (Transcript of Hearing, P.A. 35a; Opinion, P.A. 8a-9a.)

Petitioners were not forced to use the abortion or pregnancy counseling services at the University, nor to assist in

any way in the performance of the services to which they object. Petitioners have not been forced into advocating or endorsing any view of abortion or birth control, nor have they been required to associate themselves in any way with the provision of abortion services at the University. No petitioner has been required or encouraged to have an abortion or participate in abortion-related activities, nor has any petitioner been inhibited in the holding or dissemination of his or her views concerning abortion. Petitioners have been asked, as have all other students attending the various campuses of the University of California, to pay a student fee to support the wide range of student services provided by the University to its general student population.

The circumstances here are, therefore, clearly distinguishable from cases where individuals have been unconstitutionally forced to identify themselves with particular views: *West Virginia State Board of Education v. Barnett,* 319 U.S. 624, 87 L.Ed. 1628, 63 S.Ct. 1178 (1943) (compulsory flag salute unconstitutional); *Torcaso v. Watkins,* 367 U.S. 488, 6 L.Ed.2d 982, 81 S.Ct. 1680 (1961) (compelled religious oath unconstitutional); and *Wooley v. Maynard,* 430 U.S. 705, 51 L.Ed.2d 752, 97 S.Ct. 1428 (1977) (compulsory display of vehicle license slogan unconstitutional). Petitioners have not been forced to identify with the provision of abortion services by the University or any other policy decision made by The Regents. They are not compelled to profess any views relative to abortion or pregnancy counseling. Further, those opposing the University's provision of abortion services are free to disassociate themselves

from this practice. (See *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 64 L.Ed.2d 741, 100 S.Ct. 2035 (1980); *Kania v. Fordham*, 702 F.2d 475, 478, fn. 6 (4th Cir. 1983).)

B. Just as there Is No Constitutional Right to Refuse to Pay Taxes, Some Portion of Which Funds Activities Objectionable to a Taxpayer, there Is No Constitutional Right to Refuse to Pay a Student Fee Which Is Used, in Part, to Fund Activities a Student Finds Objectionable

Under the California Constitution (article IX, section 9), The Regents have plenary authority to regulate the internal affairs of the University. (*San Francisco Labor Council v. Regents of University of California*, 26 Cal.3d 785, 163 Cal. Rptr. 460, 608 P.2d 277 (1980).) While petitioners agree that The Regents have such authority, including the authority to assess fees (Petitioners' Brief, pp. 11-12), they claim the right to abstain from paying fees which are used to fund activities they find religiously, morally, or ideologically repugnant. (Petitioners' Brief, pp. 12-13.) As the Court of Appeal correctly noted, all relevant case law is to the contrary.

In *Autenrieth v. Cullen*, 418 F.2d 586 (9th Cir. 1969), cert. denied, 397 U.S. 1036, 25 L.Ed.2d 647, 90 S.Ct. 1353 (1970), where the plaintiffs attempted to assert a free exercise claim in opposition to taxes used to support the Vietnam war, the court held:

> "[T]he fact that some persons may object, on religious grounds, to some of the things that government does is not the basis upon which they can claim a constitutional right not to pay that part of their tax." (*Id.*, at p. 588.)

Relying on *Autenrieth, supra*, this Court in *United States v. Lee*, 455 U.S. 252, 71 L.Ed.2d 127, 102 S.Ct. 1051 (1982) recently stated:

> "The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious beliefs. [Citations] Because the broad public interest in maintaining a sound tax system is of such a high order, *religious belief in conflict with payment of tax affords no basis for resisting the tax.*" (*Id.*, at at p. 134; emphasis added.)

Petitioners' objections here are similar to those of taxpayers who do not wish to participate in any governmental activity which includes support for activities which they find morally, religiously or politically objectionable. The rulings below correctly adopt the reasoning of the taxpayer cases as dispositive of the free exercise issue here. Student fees, like taxes, are assessed uniformly on all participants and are utilized to fund activities which the governing body determines to be in the best interest of its constituency. Whether the assessment is termed a "tax" or a "fee" does not change the right of a governing body to make such assessment.

Further, consistent with the constitutional mandate of neutrality, the student fees at issue here have been assessed uniformly on all students regardless of their religious or philosophic persuasions. (See *Autenrieth, supra*, 418 F.2d at p. 588; *Board of Education v. Allen*, 392 U.S. 236, 20 L.Ed.2d 1060, 88 S.Ct. 1923 (1968).) Petitioners were therefore neither given favorable treatment because of their religious beliefs nor penalized because of them. The First Amendment demands no more.

II

SINCE THE LOWER COURTS CORRECTLY HELD THAT NO UNCONSTITUTIONAL BURDEN EXISTS AS A MATTER OF LAW, NO JUDICIAL INQUIRY INTO THE POSSIBILITY OF ACCOMMODATION IS REQUIRED

In considering a free exercise claim, the initial inquiry focuses on whether a constitutionally improper burden exists. (*Sherbert v. Verner*, 374 U.S. 398, 10 L.Ed.2d 965, 970, 83 S.Ct. 1790 (1963).) Only upon a showing of such a burden must the court consider whether the state's interest is a compelling one and whether less restrictive means are available. (*Sherbert, supra*, 374 U.S. 398; See *Walz v. Tax Commission*, 397 U.S. 664, 25 L.Ed.2d 697, 90 S.Ct. 1409 (1970), *Wisconsin v. Yoder*, 406 U.S. 205, 32 L.Ed.2d 15, 92 S.Ct. 1526 (1972) and *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707, 67 L.Ed.2d 624, 101 S.Ct. 1425 (1981).)[3] As noted above, the payment of a fee for health service does not pose an unconstitutional burden. No inquiry is therefore required into the nature of the University's interest or the possibility of accommodation.

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[3]Nor is petitioners' suggested accommodation consistent with the principles of insurance underwriting. A comprehensive health care insurance program is based upon the proposition that not all students will have need of all services provided, and further that some students may require health benefits far in excess of the contributions made by those students to the program. The theory is that in providing a comprehensive range of health services to the overall student population, one can achieve broader based coverage for a larger number of individuals than could be achieved on an

The Title VII and related employment cases which petitioners cite in support of their accommodation argument are inapplicable. (Petitioners' Brief, p. 33.) Statutory rights under Title VII (42 U.S.C. § 2000e) and related cases, such as *Burns* and *Tooley*,[4] have no relevance to the present case. Petitioners are not employees of the University, nor are any employment-related rights at issue. While Title VII mandates reasonable accommodation by an employer to the religious practices of an employee, no such mandate requires a university to accommodate the religious or philosophic fee paying preferences of its students, absent a violation of constitutional rights. It is apparent that no such violation exists in the present case.

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individual basis. Without the ability to spread the risk of underwriting the cost of anticipated health care services over a larger student population, the University could not provide the broad range of health services it can now make available to its students. This is especially true with pregnancy-related services. Were students given an opportunity to exempt themselves from the provision of such services provided currently by the University, it is likely that only women students would have an interest in participating. This would concentrate the economic burden in providing those services on a much smaller student population, and would therefore pose a serious threat to the availability of pregnancy-related benefits.

Furthermore, petitioners' bold assertion that the amount of health service fees allocated to abortion can be ascertained (Petitioners' Brief, p. 10) does not square with the principles of health insurance underwriting. There is no means a priori to calculate the amount of a premium that will be used for a particular health service.

[4]*Burns v. Southern Pacific Transp. Co.*, 589 F.2d 403, cert. denied 439 U.S. 1072, 59 L.Ed.2d 38, 99 S.Ct. 843 (1979); *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239 cert. denied *United Steelworkers of America v. Tooley*, 454 U.S. 1098, 70 L.Ed.2d 639, 102 S.Ct. 671 (1981).

III

THERE IS NO CONFLICT BETWEEN THE DECISION BELOW AND THIS COURT'S HOLDING IN ABOOD OR THE THIRD CIRCUIT'S RECENT DECISION IN GALDA RESPECTING ASSOCIATIONAL RIGHTS

Petitioners rely primarily upon *Abood v. Detroit Board of Education, supra,* 431 U.S. 209, and its progeny, including the recent Third Circuit decision in *Galda v. Bloustein,* 686 F.2d 159 (3d Cir. 1982), for the proposition that "the government may not condition the receipt of an important public benefit, whether it be education or employment, on the payment of dues or fees to which ideological objections are raised by those forced to pay." (Petitioner's Brief, p. 30.) Petitioners misstate the holdings of *Abood* and *Galda.* The simple presence of ideological objections to the uses of mandatorily-collected fees has, in itself, no constitutional significance. The complaining party must also show that the use objected to is not germane to the purpose of the organization. The court stated in *Abood:*

> "An employee may very well have ideological objections to a wide variety of activities undertaken by the union in its role as exclusive representative. His moral or religious views about the desirability of abortion may not square with the union's policy in negotiating a medical benefits plan . . . 'The furtherance of the common cause leaves some leeway for the leadership of the group. As long as they act to promote the cause which justified bringing the group together, the individual cannot withdraw his financial support merely because he disagrees with the group strategy' . . . ." (*Abood,*

supra, 52 L.Ed.2d at p. 276; accord, *Galda v. Bloustein, supra,* 686 F.2d 159, 163.[5])

In *Kania v. Fordham, supra,* 702 F.2d 475 (4th Cir. 1983), university students argued that the use of mandatory fees to support a student newspaper violated the principles laid down in *Abood.* In rejecting the students' constitutional claims, and thereby reaffirming its earlier decision in *Arrington v. Taylor,* 380 F.Supp. 1348 (M.D.N.C. 1974) aff'd, 526 F.2d 587 (4th Cir. 1975), cert. denied 424 U.S. 913, 96 S.Ct. 1111, 47 L.Ed. 2d 317 (1976) the court stated:

> "In evaluating the impact of *Abood* on the validity of *Arrington,* it is necessary to focus attention on the specifics of the Supreme Court's decision. The *Abood* court was concerned with labor relations in the public sector, not with the peculiar setting of a student newspaper in a public university. [Footnote omitted.] *Abood* disapproved of mandatory support for the union's ideological causes but specifically upheld the imposition of fees used by the union for its central purpose. [Footnote omitted.] In this case, the university's imposition of student fees is not designed to further the university's ideological biases, but instead to support an independent student newspaper. The university's academic judgment is that the paper is a vital part of the university's educational mission, and that financing it is germane to the university's duties

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[5]The Third Circuit remanded *Galda* in order to ascertain whether the group in question (PIRG) functioned "essentially as a political action group." (*Id.,* at p. 166.) No such assertion is made here. Only allegations regarding the University's fee support for abortion-related aspects of health care are at issue. All other allegations concerning the political and ideological activities of student organizations were voluntarily dismissed. (See Statement of the Case, footnote 1, page 2.)

as an educational institution. (*Kania, supra,* 702 F.2d at pp. 479-480.)

A long line of prior cases has likewise upheld the constitutionality of mandatory student fees provided the funded activities are germane to the University's purposes and such allocation does not amount to a program for promoting only one particular set of views. (*Chaney v. Ahlgren,* 346 F.Supp. 869 (E.D.Tenn. 1972); *Arrington v. Taylor, supra,* 380 F.Supp. 1348 (M.D.N.C. 1974); *Veed v. Schwartzkopf,* 353 F.Supp. 149 (D.Neb. 1973), aff'd without opinion, 478 F.2d 1407 (8th Civ. 1973), cert. denied 414 U.S. 1135, 38 L.Ed.2d. 760, 94 S.Ct. 878 (1974); *Good v. Associated Students of the University of Washington,* 86 Wash.2d 94, 542 P.2d 762; *Associated Students of the University of Colorado v. Regents of the University of Colorado,* 189 Colo. 482, 543 P.2d 59 (1975).)

The University's provision of a comprehensive health service program, including abortion and pregnancy counseling, is germane to the University's mission in providing support services to allow students in need of medical care to continue their education. The use of fees for this purpose therefore meets the test laid down in all applicable cases.

IV

THE DECISION OF THE CALIFORNIA COURT OF APPEAL IS ENTIRELY CONSISTENT WITH THE LANGUAGE AND INTENT OF 42 U.S.C. § 300a-7

42 United States Code section 300a-7(b)(1) prohibits discrimination in the "employment, promotion or termination, . . . or . . . in the extension of staff or other privileges to any physician or other health care personnel" because of his or her performance or refusal to perform abortions.

Subsection (d) prohibits the denial of admission or other discrimination against an applicant for training or study, including internships or residencies, "because of the applicant's reluctance, or willingness, to . . . participate in the performance of abortion . . . "

None of the petitioners are physicians or health care personnel alleging discriminatory treatment in the extension of staff or other professional privileges because of their views on abortion. And none are interns or residents who have been denied participation in a course of study because of their reluctance to perform abortions. This statute is therefore clearly inapplicable, as the Court of Appeal properly determined.

Even assuming, arguendo, that the statute were applicable, its clear intent is to ensure neutrality, not to accommodate preferences regarding views on abortions. (See *Chrisman v. Sisters of St. Joseph of Peace,* 506 F.2d 308, 311 (9th Cir. 1974).) The University's neutrality in both the provision of health services and the assessment of mandatory student fees is entirely consistent with this intent. Petitioners cite no relevant legislative history or case authority to the contrary.

CONCLUSION

Petitioners were duly admitted to the University when they met all the entrance requirements. Their views on abortion were and are irrelevant. No petitioner has been required to believe, advocate, participate in, nor identify with the provision of abortion services or pregnancy-related counseling. Petitioners have been required, as are all students attending the University of California, to pay

a registration fee which enables the University to support a wide range of student services. The fact that petitioners disagree with how some portion of such fees are used, no matter how strongly that opposition may be felt, does not give rise to a valid First Amendment claim.

The University's program of comprehensive student health services is educationally-related and religiously neutral. This neutrality should not be disturbed in favor of petitioners' particular preferences.

The decision of the Court of Appeal is entirely consistent with law, and with the strong public policy favoring the University's provision of comprehensive support services which enhance the educational opportunities of its students.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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